

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 PAUL HUPP,

10 Plaintiff,

11 vs.

12
13 COUNTY OF SAN DIEGO;
14 ALBERTSON AND DAVIDSON,
15 LLP; JAMES PATRICK ROMO;
16 THEODORE STEPHEN DRCAR;
17 JUDITH I. BEYL; STEWART
RICHARD ALBERTSON; KEITH A
DAVIDSON; BYRON KEITH
HUSTED; ROES 1-10,

18 Defendants.

19 CASE NO. 13cv2655-GPC(RBB)

20 **ORDER:**

21 **1) GRANTING MOTION TO
PROCEED IN *FORMA PAUPERIS*;**

22 **(2) DISMISSING SUA SPONTE
FOR FAILURE TO STATE A
CLAIM AND LACK OF SUBJECT
MATTER JURISDICTION;**

23 [Dkt. No. 2.]

24 On November 4, 2013, Plaintiff Paul Hupp, proceeding *pro se*, commenced
25 this action against Defendants County of San Diego, Albertson and Davidson LLP,
26 James Patrick Romo, Theodore Stephen Drcar, Judith I. Beyl, Stewart Richard
27 Albertson, Keith A. Davidson, Byron Keith Husted, and Roes 1-10 alleging
28 violations of constitutional and civil rights. (Dkt. No. 1.) Plaintiff concurrently filed
a motion to proceed *in forma pauperis* (“IFP”) under 28 U.S.C. § 1915(a). For the
following reasons, the Court GRANTS Plaintiff’s motion to proceed IFP, but *sua
sponte* DISMISSES Plaintiff’s Complaint for failure to state a claim and lack of
federal jurisdiction.

DISCUSSION

I. Motion to Proceed IFP

3 Plaintiff moves to proceed IFP under 28 U.S.C. § 1915(a). Section 1915(a)
4 allows a court to authorize a lawsuit's commencement without payment of the filing
5 fee if the plaintiff submits an affidavit demonstrating his or her inability to pay the
6 filing fee. 28 U.S.C. § 1915(a). Such affidavit must include a complete statement of
7 the plaintiff's assets. Id. However, an IFP action is subject to dismissal if the court
8 determines that the complaint is frivolous or malicious, or fails to state a claim upon
9 which relief may be granted. 28 U.S.C. § 1915(e)(2). When a plaintiff moves to
10 proceed IFP, the court first "grants or denies IFP status based on the plaintiff's
11 financial resources alone and then independently determines whether to dismiss the
12 complaint" pursuant to § 1915(e)(2). Franklin v. Murphy, 745 F.2d 1221, 1226 n.5
13 (9th Cir. 1984).

14 Here, Plaintiff has submitted an affidavit in support of Plaintiff's IFP motion
15 indicating Plaintiff is unemployed, receives family financial support of \$150 per
16 month, has no checking or savings accounts, owes \$90,000 in current obligations,
17 owns one 1986 Nissan pick-up truck that does not run, and owns no other real or
18 personal property. Based on these facts, the Court finds that Plaintiff meets the
19 section 1915(a) requirements and GRANTS Plaintiff's motion to proceed IFP.

II. *Sua Sponte* Dismissal for Failure to State a Claim

21 Notwithstanding IFP status, the Court must subject each civil action
22 commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening and order the
23 *sua sponte* dismissal of any case it finds “frivolous, malicious, failing to state a
24 claim upon which relief may be granted, or seeking monetary relief from a
25 defendant immune from such relief.” 28 U.S.C. § 1915(e)(2)(B); Calhoun v. Stahl,
26 254 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B)
27 are not limited to prisoners.”); Lopez v. Smith, 203 F.3d 1122, 1126-27 (9th Cir.
28 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but requires” the

1 court to *sua sponte* dismiss an IFP complaint that fails to state a claim).

2 “[W]hen determining whether a complaint states a claim, a court must accept
 3 as true all allegations of material fact and must construe those facts in the light most
 4 favorable to the plaintiff.” Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000);
 5 Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2)
 6 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”; see also
 7 Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005). In addition, the Court has a
 8 duty to liberally construe a pro se’s pleadings, see Karim-Panahi v. Los Angeles
 9 Police Dep’t, 839 F.2d 621, 623 (9th Cir. 1988), which is “particularly important in
 10 civil rights cases.” Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992). In
 11 giving liberal interpretation to a pro se civil rights complaint, however, the court
 12 may not “supply essential elements of claims that were not initially pled.” Ivey v.
 13 Bd. of Regents of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

14 Undertaking this *sua sponte* review, the Court finds that Plaintiff’s Second
 15 Cause of Action, alleging County of San Diego liability under 42 U.S.C. § 1983 for
 16 denial of access to a law library while in San Diego County custody, fails to state a
 17 claim upon which relief can be granted. (Compl. ¶¶ 95-97.) Section 1983 imposes
 18 two essential proof requirements upon a claimant: (1) that a person acting under
 19 color of state law committed the conduct at issue, and (2) that the conduct deprived
 20 the claimant of some right, privilege, or immunity protected by the Constitution or
 21 laws of the United States. See 42 U.S.C. § 1983; Nelson v. Campbell, 541 U.S. 637
 22 (2004); Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc). “A
 23 plaintiff must allege facts, not simply conclusions, that show that an individual was
 24 personally involved in the deprivation of his civil rights.” Barren v. Harrington, 152
 25 F.3d 1193, 1194 (9th Cir. 1998).

26 Here, Plaintiff’s Second Cause of Action alleges Constitutional violations
 27 from the County’s “denial of, including but not limited to, access to a law library
 28 while [Plaintiff] was in COUNTY’S custody.” (Compl. ¶ 95.) Taking Plaintiff’s

1 allegations as true, Plaintiff has neither demonstrated that there was state action, see
 2 42 U.S.C. § 1983; Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n,
 3 531 U.S. 288, 295 (2001), nor has he presented any facts to support a claim
 4 regarding his specific allegations of constitutional violations. For example, Plaintiff
 5 fails to allege facts such as: the timing or length of Plaintiff's custody; the County
 6 employees who allegedly caused the deprivation; or even the timing or length of the
 7 alleged deprivations.¹

8 **III. *Sua Sponte* Dismissal for Lack of Federal Jurisdiction**

9 In addition, it is well established that a federal court cannot reach the merits
 10 of any dispute until it confirms that it retains subject matter jurisdiction to
 11 adjudicate the issues presented. See Steel Co. v. Citizens for a Better Environ., 523
 12 U.S. 83, 94-95 (1998). Accordingly, federal courts are under a continuing duty to
 13 confirm their jurisdictional power and are “obliged to inquire *sua sponte* whenever a
 14 doubt arises as to [its] existence” Mt. Healthy City Sch. Dist. Bd. of Educ. v.
 15 Doyle, 429 U.S. 274, 278 (1977) (citations omitted).

16 Federal courts are courts of limited jurisdiction. Unlike state courts, they
 17 have no ‘inherent’ or ‘general’ subject matter jurisdiction. They can adjudicate only
 18 those cases which the Constitution and Congress authorize them to adjudicate, i.e.
 19 those involving diversity of citizenship, a federal question, or to which the United
 20 States is a party. See Finley v. United States, 490 U.S. 545 (1989). Federal courts
 21 are presumptively without jurisdiction over civil actions and the burden of
 22 establishing the contrary rests upon the party asserting jurisdiction. See Kokkonen
 23 v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

24 Plaintiff's Complaint alleges ten total causes of action: (1) 42 U.S.C. § 1983

25
 26 ¹The Court notes that Plaintiff provided notice in the Complaint that the Second
 27 Cause of Action is “directly related to Cause of Action XI in the Third Amended
 28 Complaint of Hupp v. San Diego County et al., Case No.: 12-cv-492 GPC (RBB)
 currently pending in this District with the Honorable Gonzalo Paul Curiel.” (Compl.
 at 1) (emphasis in original). However here, as on a motion to dismiss, the Court
 confines its review to the allegations contained in the Complaint at issue. See Ernest
W. Hahn, Inc. v. Codding, 615 F.2d 830, 841 (9th Cir. 1980).

1 liability for malicious prosecution against all Defendants; (2) 42 U.S.C. § 1983
 2 liability for denial of access to the courts against the County of San Diego; (3) 42
 3 U.S.C. § 1983 liability for conspiracy related to malicious prosecution against all
 4 defendants; (4)-(8) 42 U.S.C. § 1983 liability for gross negligence in the hiring,
 5 training, supervision, discipline, and retention of District Attorneys against the
 6 County of San Diego; (9) malicious prosecution in violation of California state law
 7 as to all Defendants; and (10) intentional infliction of emotional distress in violation
 8 of California state law as to all Defendants.

9 Plaintiff claims this Court has original jurisdiction over Plaintiff's alleged 42
 10 U.S.C. § 1983 causes of action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343.
 11 (Compl. ¶¶ 18-20.) Plaintiff further claims this Court has supplemental jurisdiction
 12 over Plaintiff's state law claims pursuant to 28 U.S.C. § 1337. (Compl. ¶ 21.) For
 13 the following reasons, the Court finds that Plaintiff's Complaint fails to raise a
 14 federal question sufficient to invoke federal court jurisdiction under 28 U.S.C. §
 15 1331 and 28 U.S.C. § 1333. Furthermore, because none of Plaintiff's claims arise
 16 under the original jurisdiction of this Court, the Court declines to extend
 17 supplemental jurisdiction over Plaintiff's state law claims and dismisses Plaintiff's
 18 Complaint in its entirety.

19 A. **Malicious Prosecution**

20 The First and Third Causes of Action alleged in Plaintiff's Complaint seek to
 21 hold private and County-employed attorneys as well as the County of San Diego
 22 liable for "malicious prosecution." (Compl. ¶¶ 74-94, 98-106.) Plaintiff alleges
 23 Defendants brought, and conspired to bring, a "Vexatious Litigant" motion against
 24 Plaintiff in a civil case, "in order to violate Plaintiff's constitutionally protected
 25 rights under the First and Fourteenth Amendment." (Compl. ¶¶ 58-72, 74-94, 98-
 26 106.) Plaintiff seeks to impose liability under 42 U.S.C. § 1983 for the alleged
 27 constitutional violations. (Id. ¶¶ 89-90, 104-105.)

28 Section 1983 provides the only private remedy under federal law for persons

1 claiming deprivation of “rights, privileges, or immunities secured to them by the
 2 Constitution and laws” by state actors. 42 U.S.C. § 1983; Carey v. Piphus, 435 U.S.
 3 247, 253 (1978). However, allegations of malicious prosecution through civil
 4 proceedings do not support a section 1983 claim. Paskaly v. Seale, 506 F.2d 1209,
 5 1212 (9th Cir. 1974) (rejecting a 1983 claim for malicious prosecution in a civil
 6 proceeding because “[m]alicious prosecution . . . is a concept applicable only in
 7 criminal proceedings.”); Howard Gault Co. v. Texas Rural Legal Aid, Inc., 615 F.
 8 Supp. 916, 938 (N.D. Texas 1985) (“To the extent that [plaintiff’s] malicious
 9 prosecution claim is cognizable under § 1983 . . . [plaintiff] cannot prevail because
 10 the state court proceeding was civil, not criminal.”), *rev’d in part on other grounds*,
 11 848 F.2d 544 (5th Cir. 1989). Furthermore, “the tort of malicious prosecution,
 12 without more, does not constitute a civil rights violation.” Paskaly, 506 F.2d at
 13 1212.

14 Because Plaintiff’s allegations of malicious prosecution occurred in a civil
 15 case, (Compl. ¶¶ 47-78), Plaintiff’s claim is not actionable under section 1983 and
 16 therefore fails to raise a federal question. The Court lacks original jurisdiction to
 17 adjudicate Plaintiff’s claim for malicious prosecution under 28 U.S.C. § 1331 and
 18 28 U.S.C. § 1343.

19 **B. Monell Causes of Action**

20 Plaintiff’s Fourth through Eighth Causes of Action allege gross negligence by
 21 the County of San Diego for failure to hire, train, discipline, and retain District
 22 Attorneys in a manner that would prevent malicious prosecution of the type
 23 allegedly committed by Defendant Deputy District Attorney James Romo. (Compl.
 24 ¶¶ 107-148.) A local government may be sued under section 1983 for “action
 25 pursuant to official municipal policy of some nature [that] caused a constitutional
 26 tort.” Santos ex rel. Santos v. City of Culver City, 228 Fed. Appx. 655, 659 n.1 (9th
 27 Cir. 2007) (quoting Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 691 (1978)
 28 (internal quotation marks omitted)). Here, Plaintiff claims malicious prosecution as

1 the underlying Constitutional tort for which he seeks to hold the County of San
 2 Diego liable under section 1983. As explained above, malicious prosecution claims
 3 in civil cases are not actionable under section 1983. Accordingly, the Court lacks
 4 original jurisdiction to adjudicate the Fourth through Eighth Causes of Action in
 5 Plaintiff's Complaint under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

6 **D. Supplemental Jurisdiction**

7 Plaintiff's Ninth and Tenth Causes of Action allege malicious prosecution
 8 and intentional infliction of emotional distress under California state law. (Compl.
 9 ¶¶ 149-169.) However, as federal subject matter jurisdiction is lacking, the Court
 10 declines to exercise supplemental jurisdiction over these state law claims. See
 11 Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 351 (1998) ("[I]n the usual case in
 12 which all federal-law claims are eliminated before trial, the balance of factors to be
 13 considered under the pendant jurisdiction doctrine judicial economy, convenience,
 14 fairness, and comity - will point toward declining to exercise jurisdiction over the
 15 remaining state-law claims."). Thus, the Court dismisses Plaintiff's claims for
 16 malicious prosecution and intentional infliction of emotional distress under
 17 California law.

18 **CONCLUSION AND ORDER**

19 For the foregoing reasons, Plaintiff has failed to allege facts sufficient to
 20 support a federal claim for relief. **IT IS HEREBY ORDERED** that:

- 21 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a),
 22 (Dkt. No. 2), is **GRANTED**.
- 23 2. Plaintiff's Second Cause of Action in Plaintiff's Complaint is
 24 **DISMISSED** without prejudice for failure to state a claim upon which
 25 relief may be granted.
- 26 3. Plaintiff's First and Third through Tenth Causes of Action in Plaintiffs'
 27 Complaint are **DISMISSED** without prejudice for lack of federal
 28 subject matter jurisdiction.

1 4. However, Plaintiff is **GRANTED** forty five (45) days leave from the
2 date this Order is stamped “Filed” in which to file a First Amended
3 Complaint which cures all the deficiencies of pleading noted above.
4 Plaintiff’s Amended Complaint must be complete in itself without
5 reference to the superseded pleading. See S.D. Cal. Civ. L. R. 15.1.
6 Defendants not named and all claims not re-alleged in the Amended
7 Complaint will be deemed waived. See King v. Atiyeh, 814 F.2d 565,
8 567 (9th Cir. 1987). Failure to file an amended complaint by this date
9 may result in dismissal with prejudice.

10 IT IS SO ORDERED.

11

12 DATED: January 8, 2014

13 
14 HON. GONZALO P. CURIEL
15 United States District Judge

16

17

18

19

20

21

22

23

24

25

26

27

28